12-1700-10317-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS

State of Minnesota by
David Beaulieu, Commissioner,
Department of Human Rights,

Complainant,

v.

Spee Dee Delivery Service, Inc.,
and Christopher J. Dahlin,

Respondents.

ORDER DENYING SUPPLEMENTAL MOTIONS FOR SUMMARY DISPOSITION

The above-entitled matter came on for decision before Administrative Law Judge Steve M. Mihalchick (ALJ) on Respondents' supplemental motions for summary disposition. No argument was held.

Erica Jacobson, Assistant Attorney General, 1200 NCL Tower, 445 Minnesota Street, St. Paul, Minnesota, 55101-2130, represented the Complainant.

Frank Kundrat, Hall & Byers, P.A., 1010 West St. Germain, Suite 600, St. Cloud, Minnesota, 56301, represented the Respondent Spee Dee Delivery Service, Inc.

David Ukenholz, Johannson, Taylor, Rust, Tye & Fagerlund, P.A., 407 North Broadway, P.O. Box 605, Crookston, Minnesota, 56716-0605, represented the Respondent Christopher Dahlin.

Procedural History

This case involves a same gender sexual harassment claim brought pursuant to the Minnesota Human Rights Act. Both the Charging Party, Lance Henrickson, and Respondent Christopher Dahlin are men and both identify themselves as heterosexual. In April of 1996, Respondents brought motions to dismiss for failure to state a claim upon which relief can be granted. Specifically, Respondents argued that the Minnesota Human Rights Act does not apply to conduct occurring solely between heterosexual men. On May 20, 1996, the ALJ issued an Order denying Respondents' motion to dismiss for failure to state a claim. The ALJ found that same gender sexual harassment claims are actionable under the Minnesota Human Rights Act and that the Complainant need not prove that the harassment was "because of" the victim's gender.

On June 25, 1996, following the taking of Lance Henrickson's deposition, Respondents Spee Dee and Dahlin filed supplemental motions for summary disposition. On July 8, 1996, Complainant filed a responsive brief. Thereafter, on July 16, 1996, Respondents requested that the ALJ issue an Order staying the proceedings in this matter pending the appeal of a Dakota County District Court case entitled

Richard S. Cummings v. Charles E. Koehnen and S & K Trucking and Landscaping, L.L.C., Ct. File No. C5-95-10309 (May 3, 1996). In that case, Dakota County Judge William F. Thuet found under a similar factual scenario that the Minnesota Human Rights Act's prohibition against sex discrimination does not apply to "heterosexual-male-to-heterosexual-male" conduct. On July 19, 1996, the ALJ granted Respondents' request for a stay of the proceedings pending the outcome of the ***Cummings*** appeal.

On December 17, 1996, the Minnesota Court of Appeals reversed Judge Thuet's decision and determined that the Minnesota Human Rights Act prohibits unwelcome verbal or physical conduct or communication of a sexual nature that creates an intimidating, hostile or offensive work environment, without regard to the harasser's or victim's gender or sexual orientation. ***Cummings v. Koehnen,*** ___N.W.2d __, WL 721531 (Minn. App. 1996). On December 17, 1996, the ALJ notified the parties that he would resume consideration of Respondents' supplemental motions to dismiss. On December 24, 1996, Respondent Spee Dee requested by letter that the ALJ continue the stay of proceedings in this matter pending an appeal of the ***Cummings*** decision to the Minnesota Supreme Court.

Based upon the Memoranda filed by the parties, all of the filings in this case, and for reasons set out in the Memorandum which follows:

IT IS HEREBY ORDERED that:

1. Respondent Spee Dee's request that the stay of proceedings in this matter be continued pending an appeal of ***Cummings v. Koehnen,*** ___ N.W.2d ___, WL 721531 (Minn. App. 1996) to the Minnesota Supreme Court is DENIED.

2. The stay issued in this matter on July 19, 1996 is hereby lifted.

3. Respondents' motions for summary disposition are DENIED.

4. The hearing in this matter will be held March 17 through 21, 1997, at the Pennington County Courthouse, downstairs board room, 1st & Main Streets, Thief River Falls, Minnesota, at 9:00 a.m., and continuing March 24 through 26, 1997, at the Stearns County Courthouse, 725 Courthouse Square, Room 344, St. Cloud, Minnesota, at 9:00 a.m.

Dated this 13th day of January, 1997.

STEVE M. MIHALCHICK
Administrative Law Judge

MEMORANDUM

As stated above, this case involves a same gender sexual harassment claim brought pursuant to the Minnesota Human Rights Act. The Charging Party, Lance Henrickson, alleges that he quit his employment at Spee Dee Delivery, Inc. ("Spee Dee") due to a hostile work environment caused by the offensive and unwelcome sexual comments of his supervisor Christopher Dahlin. Dahlin is the manager of Spee Dee's Thief River Falls terminal and was Henrickson's direct supervisor. Both Henrickson and Dahlin are men and both identify themselves as heterosexual. Following the taking of Henrickson's deposition, Respondents brought supplemental motions for summary disposition based on Complainant's alleged failure to establish a prima facie case. Respondents argue that Complainant has failed to demonstrate that Dahlin's alleged sexual comments were sufficiently severe to have interfered with Henrickson's ability to do his job or to have created a hostile or intimidating employment environment pursuant to Minn. Stat. § 363.01, subd. 41. In addition, Respondents maintain that Complainant has failed to establish that Spee Dee knew or should have known of the existence of the alleged harassment.

Summary disposition is the administrative equivalent of summary judgment. Summary disposition is appropriate where there is no genuine issue as to any material fact and one party is entitled to judgment as a matter of law. ***Sauter v. Sauter***, 70 N.W.2d 351, 353 (Minn. 1955); Minn. R. pt. 1400.5500K; Minn.R.Civ.P. 56.03. The Office of Administrative Hearings has generally followed the summary judgment standards developed in judicial courts in considering motions for summary disposition regarding contested case matters. See, Minn. R. pt. 1400.6600. A genuine issue is one that is not sham or frivolous. A material fact is a fact whose resolution will affect the result or outcome of the case. ***Illinois Farmers Insurance Co. v. Tapemark Co***., 273 N.W.2d 630, 634 (Minn. 1978); ***Highland Chateau v. Minnesota Department of Public Welfare***, 356 N.W.2d 804, 808 (Minn. App. 1984).

The moving party, in this case the Respondents, has the initial burden of showing the absence of a genuine issue concerning any material fact. To successfully resist a motion for summary judgment, the non-moving party must show that there are specific facts in dispute which have a bearing on the outcome of the case. ***Thiele v. Stitch***, 425 N.W.2d 580, 583 (Min.. 1988); ***Hunt v. IBM Mid America Employees Federal***, 384 N.W.2d 853, 855 (Minn. 1986). The existence of a genuine issue of material fact must be established by the nonmoving party by substantial evidence; general averments are not enough to meet the nonmoving party's burden under Minn. R. Civ. P. 56.05. ***Id***.; ***Murphy v. Country House, Inc***., 307 Minn. 344, 351-52, 240 N.W.2d 507, 512 (Minn. 1976); ***Carlisle v. City of Minneapolis***, 437 N.W.2d 712, 75 (Minn. App. 1988). The evidence presented to defeat a summary judgment motion, however, need not be in a form that would be admissible at trial. ***Carlisle***, 437 N.W.2d at 715 (citing, ***Celotex Corp. v. Catrett***, 477 U.S. 317, 324 (1986)).

When considering a motion for summary judgment, the facts must be viewed in the light most favorable to the non-moving party. ***Ostendorf v. Kenyon***, 347 N.W.2d

834 (Minn. App. 1984). All doubts and factual inferences must be resolved against the moving party. See, e.g., ***Celotex***, 477 U.S. at 325; ***Thiele v. Stich***, 425 N.W.2d 580, 583 (Minn. 1988); ***Greaton v. Enich***, 185 N.W.2d 876, 878 (Minn. 1971); ***Thompson v. Campbell***, 845 F. Supp. 665, 672 (D. Minn. 1994). If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted. ***Anderson v. Liberty Lobby, Inc***., 477 U.S. 242, 250-51 (1986).

Hostile Workplace Sexual Harassment Claims Under MHRA

The Minnesota Human Rights Act makes it an unfair employment practice for an employer, because of sex, "to discriminate against a person with respect to hiring, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment." Minn. Stat. § 363.03, subd. 1(2)(c) (1996). The Minnesota Human Rights Act defines "discriminate" "for purposes of discrimination based on sex" to include sexual harassment. Minn. Stat. § 363.01, subd. 14 (1996). Sexual harassment includes:

> ... unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact or other verbal or physical conduct or communication of a sexual nature when:
>
> (1) submission to the conduct or communication is made a term or condition, either explicitly or implicitly, of obtaining employment...;
>
> (2) submission to or rejection of that conduct or communication by an individual is used as a factor in decisions affecting that individual's employment...; or
>
> (3) that conduct or communication has the purpose or effect of substantially interfering with an individual's employment... or creating an intimidating, hostile, or offensive employment ... environment; and in the case of employment, the employer knows or should know of the existence of the harassment and fails to take timely and appropriate action.

Id. at subd. 41 (1996).

Respondents argue that Complainant has failed to put forth sufficient evidence to support a claim of hostile workplace environment. As a preliminary matter, Spee Dee maintains that Complainant's sexual harassment claim must fail because Lance Henrickson, a white heterosexual male, is not a member of a "protected class". Respondent's argument is incorrect as a matter of law. With respect to discrimination claims brought under the Human Rights Act, "both males and females fall within a 'protected class' ..." ***Ridler v. Olivia Public School System No. 653***, 432 N.W.2d 777, 782 (Minn. App. 1988). This interpretation is also consistent with federal case law which has refused to limit Title VII protection against sexual harassment to only women or members of a minority group. See, ***Meritor Savings Bank v. Vinson***, 477 U.S. 57, 66-67 (1986); ***Quick v. Donaldson Company, Inc***., 90 F.3d 1372, 1377 (8th Cir. 1996). Rather, the broad rule of workplace equality under Title VII strikes "at the entire spectrum of disparate treatment of men and women in employment." ***Harris v. Forklift Systems, Inc.,*** 114 S.Ct. 367, 370 (1993).

Respondents claim that Complainant has failed to establish that Dahlin's alleged offensive comments and conduct were of such frequency and severity as to rise to the level of discriminatory conduct. First, Respondents maintain that Henrickson's contact with Dahlin was minimal. Respondents contend that Henrickson spent the majority of his time during his three week employment at Spee Dee transporting packages to St. Cloud by himself in a company vehicle. Consequently, Respondents argue that Henrickson's exposure to Dahlin's alleged offensive comments was infrequent. Furthermore, Respondents claim that any remarks made by Dahlin were simply part of a general "locker room type" banter that existed at Spee Dee and were not directed specifically at Henrickson. Respondents contend that at most Dahlin's sexually-laced comments were mere offensive utterances and not the intimidating or hostile communications contemplated by the Human Rights Act.

In addition, Respondents maintain that the fact that Henrickson is complaining only of alleged verbal communications on the part of Dahlin and not any physical behavior is significant in that it reflects less severe offensive conduct. In fact, Dahlin seems to suggest that verbal communications alone, absent allegations of physical conduct, may only be characterized as mere offensive utterances and should never be enough to support a claim of sexual harassment. However, contrary to this belief, the statute clearly defines "sexual harassment" as including verbal conduct or communications of a sexual nature which interfere with an individual's employment or create a hostile environment. Minn. Stat. § 363.01, subd. 41. While the fact that Henrickson has not alleged any physical touching or other physical conduct is a factor to be considered in determining the severity of the alleged conduct, it is not fatal to his sexual harassment claim. Moreover, the ALJ disagrees with Respondents' contention that Henrickson admitted in his deposition testimony that no "sexual advances" were made toward him by Dahlin. (Henrickson depo. pp. 63-4.) While Henrickson did state that "[t]here were no sexual advances", he later clarified in his testimony that he interpreted "sexual advances" to mean physical conduct or touching. (Henrickson depo. p. 114.) Thus, Henrickson has consistently indicated that his claim for sexual harassment rests solely on Dahlin's alleged verbal communications.

Complainant can prevail on its claim of sexual harassment if it can demonstrate that Respondent Dahlin's verbal communications were of a sexual nature and created an intimidating, hostile or offensive employment environment and that Spee Dee knew or should have known of the harassment and failed to take timely and appropriate action. Minn. Stat. § 363.01, subd. 41; ***Cummings v. Koehnen,*** ___ N.W.2d ___, WL 721531 (Minn. App. 1996). Complainant need not prove that the complained of conduct or communication of a sexual nature is "because of" or "based on" either party's gender or orientation. ***Id.*** For sexual harassment to be actionable, it must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. ***Meritor Savings***, 477 U.S. at 67 (citing, ***Henson v. Dundee***, 682 F.2d 897, 904 (11th Cir. 1982).)

The test for determining whether the workplace had become a hostile environment is an objective one based on the totality of the circumstances. ***Harris v. Forklift Systems, Inc***., 114 S.Ct. 367, 371 (1993). According to the Court, factors to be considered in determining whether a reasonable person would find an environment

hostile or abusive include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." ***Id***. In addition, the victim must have "subjectively" perceived the environment to be hostile or abusive in order to prevail. ***Id.*** at 370. A discriminatory abusive work environment may exist where the harassment caused economic injury, affected the employee's psychological well-being, detracted from job performance, discouraged an employee from remaining on the job, or kept the employee from career advancement. ***Id***. at 371.

Respondents have cited ***Continental Can Company v. State,*** 297 N.W.2d 241 (Minn. 1980) and ***Klink v. Ramsey County***, 397 N.W.2d 894 (Minn. App. 1986), in support of their argument that Dahlin's alleged offensive comments are not enough to maintain Complainant's claim of sexual harassment. In ***Continental Can***, the Minnesota Supreme Court made clear that an employer has no duty to maintain a pristine work environment. ***Id***. at 249. Likewise, in ***Klink v. Ramsey County***, 397 N.W.2d at 901, the Minnesota Court of Appeals specifically held that foul language and vulgar behavior alone are not enough to automatically trigger an actionable claim of sex discrimination by a worker who finds such language and conduct in the workplace offensive or repulsive. In ***Klink,*** the plaintiff alleged that she was discriminated against through the creation of an offensive employment environment . However, the evidence presented at trial demonstrated that the plaintiff merely overheard the use of profanity and other foul language on a sporadic basis in areas outside of her work station. Furthermore, the evidence showed that the profanity and foul language were not directed at the plaintiff. ***Id***.

Unlike ***Klink***, the evidence presented in this matter indicates that sexual talk and crude behavior were pervasive at the Spee Dee Thief River Falls terminal. (Englund depo. pp. 5-10; Dahlin depo. pp. 19-23.) Glenn Englund, a night driver for Spee Dee, testified at his deposition that he thought the sexual jokes and comments at the workplace had gotten "out of control". (Englund depo. p. 5.) Moreover, deposition testimony supports Complainant's claim that it was Dahlin in particular who frequently talked about matters of a sexual nature. (Englund depo. p. 9, 19; Henrickson depo pp. 57-63.) For example, Englund testified at his deposition that Dahlin directed such sexual comments to him as "nice butt" and "how many times did you masturbate during the day?" (Englund depo. pp. 6, 19.) Dahlin himself admitted in his deposition testimony to engaging in "locker room talk" at work including commenting about co-workers' butts and boasting about sexual acts. (Dahlin depo. pp. 20-23.) In addition, Henrickson testified that Dahlin directed sexual comments such as "nice ass" specifically at him. (Henrickson depo. p. 57.).

Respondents argue that even if Henrickson's allegations regarding the sexual banter at Spee Dee are true, Complainant has failed to show that the comments substantially interfered with Henrickson's employment or created a sufficiently hostile environment. In support of this argument, Respondents point out that Henrickson admitted in his deposition testimony that he may not be offended by similar sexual comments if such comments were made to him at a social setting, such as a bowling alley, instead of at his workplace. However, the ALJ does not find this testimony to be particularly relevant or persuasive. The issue under consideration is whether the

alleged offensive comments made by Dahlin affected the terms and conditions of Henrickson's employment. The fact that Henrickson may not have found similar sexual comments to be offensive if made outside of his workplace is not decisive. Furthermore, Complainant has submitted evidence that Dahlin's comments did interfere with Henrickson's ability to perform his job and did create an intimidating atmosphere. Henrickson testified at his deposition that Dahlin's alleged sexual comments distracted him on the job, made him feel uncomfortable, and caused him to have trouble sleeping. (Henrickson depo. pp. 96, 103-4.) Finally, Henrickson claims that he quit his job at Spee Dee to avoid seeing Dahlin and "hearing that stuff." (Henrickson depo. p. 104.)

After reviewing the depositions, affidavits and other evidence submitted in consideration of this motion, the ALJ finds that Complainant has put forth sufficient evidence to raise genuine issues of material fact as to the sexual nature of Dahlin's comments and the hostile or intimidating effect these comments had on Henrickson and the workplace environment at Spee Dee.

Employer Liability

Finally Respondents argue that Complainant has failed to establish that Spee Dee knew or should have known of the alleged sexual harassment at the Thief River Falls terminal. Respondents point to the fact that Henrickson did not mention Dahlin's conduct to Spee Dee district manager Dennis Mohs, even though Mohs visited Thief River Falls terminal and spoke to Henrickson shortly before Henrickson quit his job. According to Respondents, Henrickson's failure to inform Spee Dee management about the harassment defeats his claim under the Human Rights Act.

As stated by this ALJ in the May 20, 1996 Order denying Respondents' motions to dismiss, Minnesota courts have held that where a manager commits sexual harassment, the manager's knowledge may be imputed to the employer. ***Heaser v. Lerch, Bates & Associates***, 467 N.W.2d 833, 835 (Minn. App. 1991). While employers are not strictly liable for the acts of harassment perpetuated by supervisors, imputation of knowledge of sexual harassment to the employer will be determined on a case-by-case basis. ***Fore v. Health Dimensions, Inc.,*** 509 N.W.2d 557, 560 (Minn. App. 1993). The existence of a grievance procedure and a policy against sexual harassment is relevant to determining whether an employer is liable for acts of sexual harassment. ***Meritor Savings Bank v. Vinson***, 477 U.S. 57, 72 (1986). Yet, even if a policy is in place, employers have a continuing duty to assure that its managers take appropriate action once a report of harassment is received. ***Weaver v. Minnesota Valley Labs***., 470 N.W.2d 131, 135 (Minn. App. 1991). When sexual harassment is "too pervasive to have escaped the notice of a reasonably alert management", an employer will be held liable. ***Robinson v. Jacksonville Shipyards, Inc***., 760 F. Supp. 1486, 1531 (M.D. Fla. 1991). The extent to which coworkers and supervisory personnel actually knew of the existence of sexually harassing behavior is a good barometer of the company's constructive knowledge. ***Id***.

The deposition testimony submitted by the parties is sufficient to raise a material issue of fact as to the pervasiveness of the sexual comments at Spee Dee's Thief River Falls terminal and the reasonableness of imputing knowledge of the alleged offensive behavior to Spee Dee. According to Dahlin's own testimony, the sexual comments

occurred daily and involved many of the employees including himself. (Dahlin depo. pp. 19-23.) In addition, the evidence indicates that on a prior occasion a night driver complained to Dahlin about offensive sexual comments at the workplace. (Dahlin depo. pp. 84-87.) Finally, Complainant has submitted evidence that Henrickson communicated his objections about Dahlin's behavior directly to Dahlin (his supervisor) and to assistant manager Blair Lund prior to quitting his employment. Additionally, a few days after he quit, Henrickson complained about Dahlin's behavior to Spee Dee's regional manager Mohs. The ALJ finds that Complainant has submitted sufficient evidence to raise genuine issues of material fact as to whether Spee Dee knew or should have known of the alleged offensive work environment and failed to take timely and appropriate action.

For all these reasons, the ALJ concludes that, when viewed in the light most favorable to the Complainant, the evidence submitted raises genuine issues of material fact as to whether Dahlin's conduct constituted sexual harassment under the Minnesota Human Rights Act and whether Spee Dee knew or should have known of the alleged offensive work environment and failed to take timely and appropriate action. Accordingly, Respondents' supplemental motions for summary disposition are denied.

The ALJ also concludes that the ruling of the Court of Appeals in ***Cummings*** now makes it unfair to Complainant and Henrickson to further delay the hearing. It does not appear in this record as to whether there will be a petition for review, and is is unknown whether it would be granted and whether the Supreme Court would reverse. It would be unreasonably prejudicial to Complainant to delay further for such a lengthy and unpredictable process.

S.M.M.